HON. JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN GABRIEL, RUTH BJORKLUND, and LAUREN GUSTAFSON-OMER each on his and her own behalf and on behalf of similarly situated persons,

Plaintiffs,

v.

NATIONWIDE LIFE INSURANCE COMPANY, an Ohio Corporation,

Defendant.

NO. 09-CV-00508-JCC
(Class Action)

PLAINTIFFS' MOTION FOR SETTLEMENT CLASS CERTIFICATION

NOTED FOR CONSIDERATION:
April 30, 2010

I. INTRODUCTION

John Gabriel, Ruth Bjorklund and Lauren Gustafson-Omer ("Plaintiffs") respectfully move this Court to certify a settlement class in the above-captioned action, pursuant to Fed. R. Civ. P. 23(a) and (b)(3). The parties anticipate that they will submit a proposed Settlement Agreement to the Court for tentative approval before the noting date of this Motion. Hamburger Decl., ¶2. The proposed Settlement Agreement requires the certification of a settlement class as a condition of proceeding with the settlement of this case. *Id.*

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For the reasons set forth herein and more fully described below, Plaintiffs seek certification of a settlement class defined as:

> All individuals who were covered by Nationwide Life Insurance Company under a fixed-indemnity policy between April 16, 2003, and November 23, 2009, and who were Washington residents at the time in which they enrolled or re-enrolled in the Nationwide policy.

The proposed settlement class meets all of the requirements of Rule 23(a) and (b)(3).

II. STATEMENT OF FACTS

Plaintiffs commenced this lawsuit on April 15, 2009, on behalf of themselves and all similarly situated individuals, alleging that defendant Nationwide Life Insurance Company ("Nationwide") sold them an unauthorized fixed-indemnity medical plan or plans and violated the Washington Consumer Protection Act, RCW 19.84 *et seq*. *See* Complaint, Dkt. No. 1. Nationwide denied all allegations and raised numerous affirmative defenses. Answer, Dkt. No. 6. Trial was scheduled for October 18, 2010. Minute Order, Dkt. No. 13.

From approximately January 2005 to November 23, 2009, approximately 1,037 Washington residents were enrolled in Nationwide's "fixed-indemnity" policies. Hamburger Decl., ¶4. Plaintiffs contend that during this time, the policies were not authorized by the Washington Office of the Insurance Commissioner and did not contain the required consumer protection disclosures. *See* Complaint, Dkt. No. 1, ¶¶7, 39-41. Plaintiffs further contend that Nationwide's policies did not meet all of the requirements for authorized "health plans" in Washington state. *Id*.

Plaintiffs argue that these failures caused Plaintiffs and the putative class damage. Plaintiffs maintained that they and the putative class are entitled to their choice of the equitable remedies of either (1) rescission (in this case, a premium refund)

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or (2) reformation (here, a reforming of the insurance contract to provide coverage that complies with Washington law). *Id.*, ¶¶42-46.

The parties have reached a proposed settlement in this case. Before the noting date of this motion, the parties intend to move jointly for preliminary approval of the proposed settlement. Hamburger Decl., ¶2.

The Settlement requires that Plaintiffs seek certification of a settlement class. *Id.*. Specifically, Plaintiffs request that this Court certify a settlement class defined as:

> All individuals who were covered by Nationwide Life Insurance Company under a fixed-indemnity policy between April 16, 2003, and November 23, 2009, and who were Washington residents at the time in which they enrolled or re-enrolled in the Nationwide policy.

Id., ¶3. The proposed settlement class is comprised of approximately 1,037 individuals. *Id.*, ¶4.

III. ISSUES PRESENTED

1. Should the Court certify the settlement class defined as:

> All individuals who were covered by Nationwide Life Insurance Company under a fixed-indemnity policy between April 16, 2003, and November 23, 2009, and who were Washington residents at the time in which they enrolled or re-enrolled in the Nationwide policy.

2. Should Plaintiffs John Gabriel, Ruth Bjorklund and Lauren Gustafson-Omer be appointed as the named representatives of the class, and Sirianni Youtz Meier & Spoonemore appointed as class counsel?

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IV. ARGUMENT

A. General Class Action Requirements

Under Rule 23, a court may, in its discretion, certify a settlement class so long as all of the requirements for class certification under Rule 23(a) and at least one of the requirements of Rule 23(b) are satisfied. *See Amchem Products Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997); *see also Hanlon v. Chrysler Corporation*, 150 F.3d 1011, 1019 (9th Cir. 1998). A settlement class should be certified in this case because the requirements of Fed. R. Civ. P. 23(a) and (b)(3) are met.

While settlement classes must satisfy all of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b), a district court should review the terms of the settlement in making this determination. *See Anchem,* 521 U.S. at 619-20. For example, when confronted with a request for a settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems under Rule 23(b)(3)(D) because there will be no trial. *Id*. The court must, however, ensure that those provisions which are designed to protect absent class members are satisfied. *Id*; *see also* Alba Conte and Herbert Newberg , 4 NEWBERG ON CLASS ACTIONS, § 11:37 at 56 (4th ed. 2002) (hereinafter "Newberg").

Plaintiffs ask that this Court certify a settlement class by applying the Rule 23(a) and 23(b)(3) criteria to the present posture of the case, *i.e.,* a case where the parties propose to settle their dispute, contingent upon certification of a settlement class.

B. This Settlement Class Meets Requirements of Rule 23(a)

Pursuant to Rule 23(a), certification of a class requires a showing of numerosity, commonality, typicality and adequacy of representation. *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994).

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1. Numerosity

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." This criterion is easily met here. There are approximately 1,037 individuals who meet the settlement class definition. Hamburger Decl., ¶4.

The size of the class, however, is not all that courts must consider. Rather, "[i]n reality … Rule 23(a)(1) is an impracticability of joinder requirement." 1 Newberg, § 3:3. In addition, "[t]he practicability of joinder must be evaluated in light of the circumstances of the particular litigation." *Id.; see also, Smith v. University of Washington Law School*, 2 F.Supp.2d 1324, 1340 (W.D. Wash. 1998) (joinder does not need to be impossible, but simply impracticable depending on the facts and circumstances of the case). "[F]actors such as the geographical diversity of class members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought, should be considered in determining" whether joinder is practicable. *Jordan v. County of Los Angeles,* 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982).

Here, these factors support class certification. Class members are geographically dispersed across all parts of the state. Hamburger Decl., ¶4. Additionally, given the relatively small amount of benefits sought by each individual, and the high cost of legal representation, few beneficiaries may be able to institute their own litigation. *Id.*, ¶¶5-6. Plaintiffs have thus satisfied Rule 23(a)(1).

2. Commonality

Civil Rule 23(a)(2) requires plaintiffs to show that questions of law or fact are common to each member of the proposed class. The existence of shared legal issues establishes commonality:

> Indeed, Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the

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> rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

Rule 23(a)(2) requires that there be at least one question of law or fact common to members of the class. *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001); *Blackie v. Barrack,* 524 F.2d 891, 904 (9th Cir. 1975); *see also* Newberg, § 3:12. Commonality does not require that plaintiffs' injuries be identical to those of other class members, only that the injuries are similar and that they result from the same course of conduct. *King v. Riveland*, 125 Wn.2d 500, 519, 886 P.2d 160 (1994) (certification appropriate when defendant engaged in common course of conduct, even if conduct affected prospective class members differently); *Baby Neal v. Casey*, 43 F.3d 48, 56 (3rd Cir. 1994) (showing of a single common question of law or fact can satisfy commonality).

"The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Baby Neal,* 43 F.3d at 56. This test is "easily met" because "the requirement may be satisfied by a single common issue." *Id*. (*citing* 1 Newberg § 3.10 at 3-50). Commonality is not defeated by a showing that individual facts and circumstances will have to be resolved. *Id.* at 57; *Blackie,* 524 F.2d at 905.

Each proposed class member was enrolled in the same Nationwide "fixed-indemnity" medical policy. Common questions to all proposed class members include (but are not limited to) the following: (1) whether Nationwide sold a "fixed-indemnity" policy to putative class members; (2) whether Nationwide did so without having obtained the required approval for the policy from the Washington State Insurance Commissioner; (3) whether Nationwide's policy did not comply with the

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Washington Insurance Code; and (4) whether rescission or reformation are available legal remedies to the putative class as a result of Nationwide's acts or omissions. *See* Complaint, Dkt. No. 1, ¶11.

The requirements of Rule 23(a)(2) have been satisfied.

3. Typicality

Rule 23(a)(3) is met where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality is found when (1) other members have the same or similar injury, (2) the action is based on conduct that is not unique to the named plaintiffs, and (3) other class members have been injured by the same course of conduct. *Hansen v. Ticket Track, Inc.*, 213 F.R.D. 412, 415 (W.D. Wash. 2003), *citing Hannon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "Where the same unlawful conduct is alleged to have affected both the named plaintiffs and the class members, varying fact patterns in the individual claims will not defeat the typicality requirement." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320, 54 P.3d 665 (2002); *see also Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975) (typicality is satisfied "so long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory"). All that is required is that class members have injuries similar to the representatives and that those injuries result from the same course of conduct. *Armstrong,* 275 F.3d at 869.

Under Rule 23(a)'s permissive standards, representative claims are "typical" if they are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. "[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Baby Neal*, 43 F.3d at 58. As a result, "[w]here an action challenges a policy or practice, the named plaintiffs suffering

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one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice." *Id.* at 57-58. "[T]he Ninth Circuit has noted that the commonality and typicality requirements of Rule 23(a) tend to merge. A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Hunt v. Check Recovery Systems, Inc.*, 241 F.R.D. 505, 510-11 (N.D. Cal. 2007) (internal citations omitted).

Here, the named Plaintiffs and the putative class members all allege economic damages resulting from the same course of conduct, and their claims are based on the same legal theory. The requirements of Rule 23(a)(c) have therefore been satisfied.

4. Adequate Representation

Fair and adequate protection of the interests of the settlement class requires that: (1) counsel representing the class must be qualified and competent, and (2) the class representatives must not have antagonistic or conflicting interests with the unnamed members of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them. *Hanlon*, 150 F.3d at 1020, citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940).

The requirement of adequate representation set forth in Rule 23(a)(4) has two components: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. Where there are no conflicts between the class representative and other class members,

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the focus is "primarily on class counsel, not on the plaintiff, to determine if there will be vigorous prosecution of the class action." Newberg, § 3:24.

The claims and interests of Plaintiffs in seeking resolution of the common issues identified above are not in conflict with any interests of the proposed class. Their claims and interests are reflective of that of the proposed class. Hamburger Decl., ¶7.

The declaration of the undersigned counsel who represents the named Plaintiffs establishes that the law firm of Sirianni Youtz Meier & Spoonemore is well-qualified and has and will commit adequate resources to conduct the litigation and conclude the settlement process. Plaintiffs' counsel have extensive experience in class-action challenges and healthcare litigation. *See* Hamburger Decl., ¶¶8-17. Thus, the requirements of Rule 23(a)(4) are satisfied.

C. This Action Also Meets the Requirements of Rule 23(b)(3)

Rule 23(b)(3) permits a class action when questions of law or fact common to the class members predominate over questions affecting individual members, and such an action is superior to other available methods of adjudicating the controversy. The rule "encompasses those cases in which a class action would achieve economies of time, effort and expense, and would promote uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results." Rules Advisory Committee Notes to 1966 Amendments to FRCP 23.

The focus of the common questions inquiry is on "whether a class suit for the unitary adjudication of common issues is economical and efficient in the context of all the issues in the suit." 1 Newberg § 4.25. An action will satisfy the test where a common issue is the "central or overriding question," or where "there is an essential common link among class members and the defendant for which the court provides a

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remedy." *Id*. Put otherwise, common issues are said to predominate where there is a common nucleus of operative facts relevant to the dispute, and those common questions represent a significant aspect of the case that can be resolved for all members of the class in a single adjudication.

In the context of a settlement-only class, the Rule 23(b)(3) inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Amchem,* 521 U.S. at 623. It is similar to the "typicality" requirement under Rule 23(a). *Id.* at 623, n.18.

Here, class members each have the same claims, including, at the very least, whether their coverage under Nationwide's "fixed-indemnity" policy violated state insurance requirements, and if so, whether those violations entitled them to damages. Thus, common questions of law and fact can be resolved for the entire class and predominate over those affecting certain individuals. A class action is superior for resolving this controversy, particularly given the relatively small amounts at stake for most individual class members. Hamburger Decl., ¶6. Finally, to the best of Plaintiffs' counsel's knowledge, no other litigation has been brought concerning the issues in this case by any putative class member. *Id.*, ¶8.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for Certification of a Settlement Class.

DATED: April 9, 2010.

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CERTIFICATE OF SERVICE

2 I hereby certify that on April 9, 2010, I electronically filed the foregoing with the
3 Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

4
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13 and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

14
- (No manual recipients)

15 DATED: April 9, 2010, at Seattle, Washington.

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17 */s/ Eleanor Hamburger*

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